No. 11,766

IN THE

United States Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,
Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, STERLING BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION,
Appellees.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant above named respectfully applies to this Court for a rehearing of the above entitled cause, upon the following grounds:

Premise

These defendants stand before the Court as admitted wrongdoers. They admit the allegations of the conspiracies culminating in that of 1929 and as alleged in the complaint, and further admit that the purpose of the same

was to destroy plaintiff financially. They admit their activities pursuant to such conspiracy of 1929 through the years from its formation until September 1, 1944 when the mandamus action against the Secretary of the Interior was filed in Washington, D. C., and involving the Little Placer activities. See paragraphs 57 to 81, inclusive, of the complaint (Tr. pp. 28 to 54, incl.), alleging the formation of the conspiracies and activities of defendants pursuant thereto. These paragraphs are all admitted with the exception of paragraph 75 (Tr. p. 190). Defendants attempt to escape such admissions and wrongs by pleading the Statute of Limitations.

Since when has Time turned Wrong into Right? Since when have the Courts of this land ceased to be guardians of the weak against the crookedness of the strong and placed their stamp of approval on such conduct and such wrongs? Yet, this Court has permitted such defendants to turn the Statute of Limitations from a Statute of Repose into a Statute of Escape.

The viciousness and intent to destroy born of the conspiracies charged have been carried clear through the years until the admission by defendants of their wrongdoing in the actions brought by the Government in 1944.

The formation of the conspiracies as alleged in the Complaint and the activities of defendants thereunder were all frauds and wrongs inflicted upon plaintiff and its approximately 7000 stockholders (Tr. p. 356). Such frauds were concealed during all of such years. This is conclusively shown by the fact that even in the face of Mr. Burnham's constant inquiries at the doors of various governmental departments it was not until 1944 that the Government,

with all of its power, was able to find evidence of such conspiracies sufficient to enable action on its part.

If there ever was a case in which the equitable doctrine of Holmberg v. Armbrecht (327 U.S. 392) should be applied, it is the one before Your Honors. To refuse to do so is an award to defendants for their wrongdoing and an approval of the damages which they caused plaintiff to suffer.

We submit that this Court decided this case without a consideration of the foregoing facts and, therefore, a rehearing should be granted.

I.

THIS COURT ERRED IN HOLDING:

(1) "Where (as Here) a Private Suitor Asserts a Claim Under the Sherman Act for Damages, the Gravamen of the Complaint Is Not the Conspiracy." (Page 3 pamphlet opinion)

This holding is contrary to the rule as laid down by the Supreme Court which holds that the gravamen of the complaint IS the conspiracy. And

(2) "We Hold That This Is an Action at Law for Damages Under Federal Antitrust Laws and the Only Damages for Which a Recovery Might Be Had Are Those which Accrued and Were Suffered Within Three Years Prior to the Filing of the Complaint and the Record Reveals That None Were Shown During This Period. The Court Therefore Properly Held the Cause Barred by Section 338(1) of the California Statute of Limitations." (Pages 15-16 pamphlet opinion)

Such statements eliminate the equitable principles urged by appellant but discarded by this Court, so under this heading we will discuss the point at issue purely from the

law side, leaving for future presentation herein the error which we believe occurred in the elimination by this Court of the equitable question.

But, we also contend that even from the law side, such portion of the opinion is contrary to the law as laid down by the Supreme Court. It is a misconception of the anti-trust law and makes the question of *damages* rather than *conspiracy* the point at issue and the gravamen of the cause of action. Section 15 of Title 15 U.S.C.A. (quoted below) is the provision creating this right in individuals and giving to the injured party his *cause of action.*

> "Any person who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws may sue therefor* in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The words "by reason of anything forbidden in the antitrust laws" relate back to Sections 1 and 2, T. 15, which set forth the forbidden acts, among which is the conspiring to restrain trade and the conspiring to monopolize or attempt to monopolize. The present complaint is based both upon a conspiracy to restrain trade and also a conspiracy to monopolize or attempt to monopolize. It is therefore the *conspiracy* formed by these appellees to injure appellant that is the gravamen of the action, not the damages resulting from such conspiracy. Congress definitely and conclusively created a new right and cause of action, a direct action upon the conspiracy itself. This,

Congress had the right to do, as definitely decided in the antitrust case of

Chattanooga Foundry etc. v. Atlanta, 203 U.S. 390; 51 L.ed. 241,

where it was stated at the bottom of p. 396 of the official report:

> "There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law. W. W. Montague & Co. v. Lowry, 193 U.S. 38, 48 L.Ed. 608, 24 Sup. Ct. Rep. 307."

The overt acts from which damages arise form no part of a conspiracy, for the conspiracy and the overt acts are separate and distinct, so that a plaintiff in suing for treble damages resulting from an antitrust conspiracy bases *his cause of action* solely upon the conspiracy which is condemned in Secs. 1 and 2, T. 15, and not upon the *damages resulting* to him by reason of such conspiracy. In the opinion filed herein this Court failed to recognize such distinction and made a question of damages the gravamen of the action. That this distinction is fully recognized is shown by the following cases cited on pp. 4 et seq. of appellant's reply brief to the brief of Borax Consolidated, Ltd. They are:

Nash v. United States, 229 U.S. 373; 33 S. Ct. 780;

United States v. Socony etc., 310 U.S. 150; 60 S. Ct. 811;

United States v. New York etc. (5th Circ.), 137 F.2d, 459; (Cert. den. 320 U.S. 783),

where at p. 463 the Court quotes with approval from *Nash v. U.S.* supra and other cases of that Court.

Such cases were criminal cases but that the rule is applicable also in civil actions under the antitrust law was definitely decided by the case of

Albert Pick-Barth Co. v. Mitchell etc., 57 F.2d 96 (Cert. den. 286 U.S. 552).

In that case the Court said:

> "To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. *Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1;* but if overt acts are proved in furtherance of the offense defined in section 1, and anyone is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor."

The conspiracy of '29 charged upon herein and its purposes were alleged with particularity in the complaint (Tr. pp. 34 et seq.). **These allegations were not denied by appellees and therefore must stand admitted for all the purposes of this appeal.** Such allegations show the formation of the conspiracy, its purposes and activities, and its effects. The purposes of the conspiracy were set forth in detail and the activities of the defendants thereunder likewise alleged. A statement of the overt acts under such conspiracy so far as they affected plaintiff is set forth in the complaint, Par. 72 (Tr. pp. 40 et seq. to and including Par. 80, Tr. p. 53). Particularly are set forth (commencing Par. 77, Tr. p. 48 to Par. 80, inclusive) the overt acts

present in the so-called Little Placer Claim, the last of which occurred subsequent to the 31st day of July, 1944 as alleged in Par. 78 (Tr. p. 52). **Nowhere in the record is there any denial of such allegations, so for the purpose of this proceeding they must be considered as admitted.**

Par. 81 of the complaint (Tr. p. 53) alleges that all of the activities of defendants set forth previously in the complaint were pursuant to and in furtherance of the conspiracy, all of which acts resulted in damage to plaintiff in the amount named in that paragraph. Such paragraph includes the activities under the Little Placer Claim and includes all of the damages suffered by the misconduct and fraud of defendants into the one amount of damages alleged in such paragraph. Therefore the Little Placer activities having been included therein, the statement of the Court that no damages were suffered through such Little Placer activities is incorrect. The fact that difficulties may arise in the trial on the merits in ascertaining the damages resulting from the "Little Placer" overt act is no reason why they should be eliminated.

See

Bigelow v. RKO Radio Pictures, 327 U.S. 205, 66 S. Ct. 574; there it was held:

> "Justice and public policy require that a wrongdoer shall bear the risk of uncertainty which his own wrong has created and which prevents precise computation of damages."

See Subdivision (5), p. 265, where it is said in part as follows:

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong

has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." (Citing cases).

(Remember, please, that neither the allegations of Par. 81 nor of the preceding paragraphs setting forth the overt acts are denied in any respect by the appellees and therefore for the purposes of this proceeding stand admitted.) In the absence of a demand for particularity the lumping of the damages is all that is required. See

National Nut Co. v. Kelling, 61 F. Sup. 76 and cases cited.

The opinion of the Court overlooks entirely these admissions by appellees. The reference in the opinion to the so-called admissions of counsel for appellant that no damages had resulted from the activities of appellees in reference to the Little Placer go far beyond the real purpose and intent of the colloquy that was had between the lower court and such counsel. This question showed that the lower court failed entirely to realize the importance of these admissions in the pleadings by the appellees. Such conversation occurred during a discussion of the case of

Northern Kentucky Tel. Co. v. Southern Bell Co., 73 F.2d, 333,

which holds that a conspiracy continues so long as overt acts are being committed by one of the conspirators. The discussion in question was as follows (Tr. pp. 234-242):

"The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy and that the statute does not

run as long as the conspiracy continues to be in effect?

"Mr. Carr: No, I do not go that far. My idea would be that it would run from the last overt act.

"The Court: What do you allege in the complaint to be the last overt act?

"Mr. Carr: The Little Placer claim. They have studiously avoided any discussion of the Little Placer claim until this morning, and then Mr. Lasky comes in with a motion to strike it out; it has no applicability. We could not prove any damages from it, but we make a live issue of that thing in the complaint. Beginning with paragraph 77 on page 36 we start in a story of the Little Placer claim. In paragraph 77 we approach it historically. There were, as a matter of fact, only 10 acres in this Little Placer Claim. It was the one, the only outstanding Kernite deposit that was known to exist in the world, and we had made our application. Counsel was right this morning in describing the two methods of acquisition, either by a mineral claim or by a lease, and the Government held that it was at one time subject to a lease. Now, we made application first on the land and our lease was turned down as a matter of law. Subsequently we went through various divisions of the Department of the Interior, and when we got to the head we finally won out completely, and the defendants, here, who were applying, were put out of court, leaving the claim wide open, which we believe was subject to our application which we had in, and on page 37 we set forth, we state:

> 'That the facts of said endeavor of plaintiff to secure said lease upon said "Little Placer," and the opposition of defendants thereto, is as follows:'

"Now, the defendants pursued us wherever we went in search of land or property, including this Little

Placer claim, particularly because of its very valuable possibility to the thing, and not only possibility, but a very valuable asset, because, as I have said, it was the last known and the only known held property in which the Kernite could be produced. The defendants held complete monopolization. They endeavored to keep us out of the Little Placer with further activity on their part, in the performance of their monopoly which they had. Then we go on in paragraph 78 to give some further account of our activity, and we say:

'As set forth in paragraph 71 of this complaint, the defendants, Borax Consolidated, Ltd., and Pacific Coast Borax Company, have controlled since 1934, and now control, all of the world's known Kernite deposits except 10 acres thereof, known as the Little Placer claim. Ever since June of the year 1928 plaintiff has been endeavoring to secure a lease from the said United States Government upon said Little Placer under and by virtue of the laws appertaining thereto, but all of such endeavors of plaintiff have been contested, fought and blocked by the actions of the defendants herein in pursuance to the said unlawful plan and conspiracies of said defendant to own, control and market all borax in all its forms and products, in all the world, and to prevent competition therein, and to that end, to drive plaintiff from all activities and business in the field of borax and its ownership, production and sale.'

"Then we set forth, as I say, the various acts, not only of ourselves, but of the defendants, and go on to show that our application for this particular lease is still pending, and the defendants, after this defeat before the Department of the Interior, applied for a

writ of mandamus in the District Court of the District of Columbia to force the Secretary to give to them this lease that they claimed.

"Another illustration contrary to that cited by counsel this morning to the effect that you could not reach that matter in court by legal proceedings, and that the matter rested wholly within their discretion is that while that action was pending for the writ of mandamus, the Government brought on for trial its action here before your Honor, and there the defendants charged stood up and admitted their wickedness and their guilt—

"Mr. Harrison: You do not mind if I interrupt again?

"Mr. Carr: Not at all, I expected it.

"Mr. Harrison: There was an express statement in the decree that we admitted nothing, your Honor.

"Mr. Carr: That is an anachronism. You cannot say you admitted nothing. This question is going to come all through this matter. I do not say that those judgments in that particular case constituted prima facie evidence, and that is the only thing that the court says they will not constitute, but that does not prevent us from calling upon that judgment in that case as an admission. It is ridiculous, and it never could be held that people coming in here and paying $140,000 and saying, 'I never did it at all'—if that was true and they had never been guilty and were not pleading in fact guilty to the charges made, the court would have had no jurisdiction. It would have had to throw the case out. The court could never have levied the fine. We do not contend, as I say, that any of those judgments, either in the civil or in the criminal case, are prima facie evidence, but we do say that it is evidence of admission of guilty,

and you can't get away from that no matter what you put in the judgments.

"Mr. Lasky: You overlooked the cases we cite.

"Mr. Carr: Oh, yes, but they do not go that far. You picked out a few little words here and there, but they do say they cannot be used as conclusive proof of the charges made, which we admit, but we do say that they do constitute admissions just like if I had met these people on the street and said, 'Here you are charged with these crimes and with these misdemeanors and these acts,' and they said, 'Yes, we did it. We are guilty, but we thought we could get by with them.' Then they come into court and enter a plea of nolo contendere, which is a sort of polite plea—that is about the best you can say about it. It is worse than a Scotch verdict—'Not guilty but don't do it again.' It is a confession. You can't get away from it, no matter what you put in your judgment here that they do not confess anything. If they did not confess it, how could the courts have levied the fine? You can never contend, in the face of the charges made, that it is a voluntary payment. They came in here and admitted those allegations. They have got to in order to save their hide. They know what might happen to them if the court did not take it. These consent decrees are simply a consent to a decree being entered against them in the matter, and then it is customary to go on and say, 'Well, we do not admit anything. We are not guilty of anything, but we are going to pay you $140,000, or whatever the court says we must pay.'

"There can be no question as to that. I will be glad to meet you on that when the time comes. I think there are plenty of cases and sound reasoning on that, and the statute, itself, only says it shall not

be prima facie evidence, which is all right, but that does not say that they are not admissions of guilt, and that is exactly what occurred here.

"Now, with respect to the Little Placer, we go on to say:

> 'That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said conspiracies, plans and combinations hereinbefore in this complaint set forth and described with the intent and purpose of controlling and dominating, throughout the world and in interstate commerce, the mining, production and sale of borax in all its various forms and products, and with the intent and purpose of injuring and destroying plaintiff's activities as herein set forth and removing plaintiff as a competitor of defendants, or some of them, in the said mining, production and the sale of borax in all of its forms; that due to said intents, purposes and acts of defendants, plaintiff has been damaged,' and so forth.

"That is a complete tie-in, a complete overt act. Nothing could be a stronger overt act than the activities of these defendants throughout this whole proceeding.

"And remember, may it please your Honor, so far as this motion is concerned, those are all admitted facts, that they did all of these things just as alleged in the complaint, and we (they) cannot say that that is not an overt act. Some contention was made that because we might not be able to recover damages by reason of their activities—true, we cannot for this particular overt act, *unless we can show actual damage, but that comes on the trial of the case and not on a motion to dismiss, where the statute is the main*

ground for their motion. That is factual and not legal to the extent we are considering today.

"The Court: Your client could have continued on in this business after 1929 without this Little Placer claim, could he not, in the absence of the alleged activity of the defendants?

"Mr. Carr: No, your Honor; as a matter of fact, when we were put out of business by the price cuts in 1929 we still had our plant, and we hung on and tried to make the thing go. We were trying to get this Little Placer. If we could have had the Little Placer we could have secured Kernite and we could have produced it somewhat on a comparable basis with the defendants, if we were not run out of business otherwise some way or other, but that would have given us a chance. We still own it. It is not alleged in the complaint as to the year, but we do say—

"The Court: I think you are referring to page 36.

"Mr. Carr: Maybe that is it, your Honor. It states, 'And thereafter plaintiff struggled on as best it could to survive, but ultimately it was obliged to default in the payment of its rentals due under such Searles Lake lease.'

"We had one of those leases there and could not pay under it.

> '* * * with the result that the United States of America, as lessor, canceled said lease and retook possession of said lands and buildings permanent installations thereon; that thereafter certain stockholders of plaintiff, in an endeavor to save the situation, applied to said United States Government for a lease upon said premises and equipment; said application was subsequently denied,

and thereafter said lease and improvements were offered for bid, at which time defendants, American Potash & Chemical Company, bid for said lease and was given the same for the sum of approximately $130,000; (said lease contained certain additional land.)'

"The Court: Let me interrupt you again.

"Mr. Carr: Yes, certainly, any time.

"The Court: I am trying to get your point clear in my mind. Assuming, as you have alleged, the plaintiff was forced out of business, and, as the plaintiff alleges, the plant and business of the plaintiff was shut down in January, 1929—

"Mr. Carr: Yes.

"The Court: And thereafter he tried to keep his lease on the source of supply in good standing, but because the business was shut down and he did not have any money he was unable to keep that in good standing. I think that is a fair inference.

"Mr. Carr: That is correct.

"The Court: So from time to time he besought the Government to keep that lease in good standing for him.

"Mr. Carr: Yes, Your Honor.

"The Court: Because his business was closed down, or he could not get the money to do that, he was ultimately unsuccessful in maintaining that. Where is the overt act of the defendant that has to do with that?

"Mr. Carr: The overt act is the Little Placer claim."

Also, Tr. pp. 243-46, where counsel for appellant stated that plaintiff had the buildings and the plant at Searles Lake and was in a position to go ahead with its business.

"Mr. Lasky: The Searles Lake plant was at Searles Lake. The Little Placer was several hundred miles away, and was a mine. Do you contend we were going to use the material from the mine in the Searles Lake plant?

"Mr. Carr: Certainly. They carry many things —for example, aluminum and other ores—over two or three hundred miles. Take the iron ore up in the Michigan District. They bring it across the Great Lakes. Take Ford's factory there at Detroit, or near Detroit.

"The Court: I do not think that is what counsel means. He is referring to the character—

"Mr. Lasky: Yes, the Searles Lake process was one of evaporation from the lake.

"Mr. Carr: We could have changed that. What is the difference? We had our buildings and our plant there. It is something which could have been changed, or if necessary we could have gone and built a plant, but we had our plant and we were perfectly willing to move it. There is nothing strange about that, bringing raw material to your plant, and there is nothing strange in changing the machinery in your plant to handle a different product. There is nothing strange in that, at all, except you might have struck ice picks in our tires going down there while we were carrying it in. But we contend, Your Honor, that the Little Placer is tied in directly into *your* business. The overt act continued from 1929, from the day we filed our application we met opposition from these people, and naturally they were doing their best to secure these ten acres because if they did, they would have had every known supply in the world of this Kernite. They could have had no opposition or no competition, whatsoever, and it was necessary for

them to do that, as they felt for their own protection to secure this in order to accomplish the fruits of the conspiracy which had long before that been established and created. And so we say that our complaint, blushingly say it in the face of all the charges made against the fruit of it, that we do allege the combination, the unlawful combination both under sections 1 and 2 of the Antitrust Act. The complaint goes on and shows the performance of these overt acts, a continual set of them from the time we got in the business, and particularly from 1929 right on, and the denial by Zabriskie of intention to injure, and the further fact that we had no knowledge of the formation of this conspiracy. We knew nothing about it. That, we contend, was the basis of it, and the concealment of those conspiracies. As Your Honor said yesterday, they did not go out on the courthouse steps and talk blatantly about what they had done and were going to do to everybody. Of course not. The were concealed, and while we knew and felt the force of all these overt acts that were being placed against us during all this period of time, we had no knowledge of a conspiracy. We did not know that this contract of 1929 had been entered into prior, nor did we know of it subsequently. I think they call it the contract made after they came out here, shortly after their meetings in Germany and in England. They came out here and, as I said, scooped other victims into the thing and renewed their conspiracy with the Stauffer people, making them parties. They carried on a continuous conspiracy, and the only thorn in their side was Burnham. He was down there struggling to get ahead with his comparatively small plant against this octopus which was pouring out its wrath and indignation that we should even have

presumed to set out on a venture of this kind as against their wishes.

"As I say, we have proved the conspiracy. We have alleged the conspiracy in our complaint. We have alleged the overt acts, and we have alleged the last of which was the Little Placer situation, which was continued until they confessed their wickedness in this court and contended that this court should make as a part of its judgment an order that they should abandon all applications, all attempts to secure that particular claim. And it continued up until past the filing of our particular suit. And let me say this, that this conspiracy, framed under the provisions of sections 1 and 2 of the Antitrust Act, was never known to us and was not disclosed, and we could not find out about it until after the Government, with all its might, had brought its suit here and had disclosed the formation of that 1929 agreement and the subsequent western agreement out here."

In this connection see also paragraph 80 of the complaint (Tr. p. 53) which alleges:

"80. That all of the actions and activities of the defendants, or some of them, in contesting the said application of plaintiff for said sodium lease upon said 'Little Placer,' were performed and carried out by said defendants for the purpose of preventing plaintiff from securing said lease upon said 'Little Placer,' and through which desired lease plaintiff would have been able to enter into competition with defendants in the production, manufacture and sale of borax in its various forms."

This, in connection with the other allegations of the complaint, constitutes sufficient basis for a proof of the

prospective damages which were suffered by appellant through the activities of appellees in blocking the securing of its lease to the Little Placer. Such allegations are sufficient for such purpose.

Triangle Etc. Co. v. National Electrical Etc. Co., 152 F.2d 398 (3d Circ.).

That appellant was counting on the lease of the Little Placer from which to obtain crude borax, thus enabling it to resume operations at its Searles Lake plant, is also shown by the testimony of Mr. Burnham to such effect (Tr. p. 574).

This question of damages was considered later on in the trial (Tr. pp. 785-6) where the following conversation occurred:

"The Court: You mean you could not show any damage from the 1929 conspiracy?

"Mr. Carr: Under the 1929 conspiracy which we stand on here.

"Mr. Harrison: He does not plead any damage under the 1929 conspiracy.

"Mr. Carr: Oh, yes, we do. We plead lots of damage.

"The Court: Maybe I misunderstood what you just said. I gathered from what you said that you would not be able to show any damage from the 1929 conspiracy.

"Mr. Carr: *No, I said if we could not. I do not say we cannot, because we believe we can.* But the overt acts all go to the measure and extent of the damage resulting from the basic conspiracy of 1929. If we cannot, when it comes to the main trial, prove that those damages were incurred as the result of

> the 1929 conspiracy, of course, we cannot recover. But that is not the question here. The question here is whether or not the statute has run as to the 1929 conspiracy, and nothing else is before this court at this time."

In view of the above it is difficult to understand why this Court should have indulged in so much discussion as to the claimed admission made by counsel for appellant that we could not prove any damages from the Little Placer activities. A reading of the allegations of the complaint, which are admitted by the defendants, coupled with the colloquy between the lower court and such counsel, show the real meaning of such statement of counsel, viz. that on this trial on the statute, and in face of the allegations of the complaint as to damages and the admissions by appellees of such allegations, including those resulting from the Little Placer activities, the discussion of the actual existence of such damages and the amount thereof would necessarily have to be postponed until the trial of the case on the merits. It is clear that what counsel meant, no matter how ineptly expressed, was that on the trial on the Statute of Limitations the question of damages was a legal one in which the existence of the same was admitted by appellees, the amount of which, however, would have to await the trial on the merits. That is a far cry from a statement that no damages could later on be proved. No significance is given by the Court to the admissions made by appellees through their failure to deny the allegations of the complaint and referred to above, including those in re Little Placer, which are of far more significance than the one statement of counsel for appel-

lant referred to so often in the opinion. *That statement was not evidence nor did it form any part of the record of the case.* That such is correct is definitely shown by the following exchange between the lower court and both of counsel (Tr. 392):

> **"Mr. Harrison: May I ask your Honor to state to the Jury that any statements made on matters are not evidence?**
>
> **"The Court: You mean the statements by the counsel?**
>
> **"Mr. Harrison: Yes, statements made by counsel.**
>
> **"The Court: I thought I covered that.**
>
> **"Mr. Carr: Yes.**
>
> **"The Court: I spoke of the arguments by the Court and counsel and I meant to include the statements of counsel as well as the statements of the Court. Neither of them are evidence in the case, ladies and gentlemen."**

In the opinion all of these admissions and such evidence as last quoted above are disregarded and passed by as of no moment. This must have been through inadvertence of the Court and we respectfully request that this point be re-examined by the Court and careful investigation made thereof.

Likewise, this Court seems to have taken for granted the statement of counsel for appellees that no overt acts were committed after 1929. Such is not correct. They were, in part, a conversation on October 19, 1937 between Mr. Emlaw and Mr. Baker representing certain of the appellees, and Mr. Burnham, in which both Mr. Emlaw and Mr. Baker stated to Mr. Burnham that "there is no connection between us, at all, between the two corpora-

tions," i.e., American Potash, etc., and Pacific Coast Borax (Tr. p. 396). This in the face of the admission of appellees of the allegations of the complaint in which they are charged with unlawful activities directed against appellant during that period; second, appellant lost its lease upon Searles Lake in the year 1938 (Tr. p. 792) as a direct result, as claimed in the complaint and admitted by the failure of appellees to deny, of the activities of appellees. That all of these activities of appellees were pursuant to the conspiracy was not discovered by appellant until the commencement by the government of its civil and criminal proceedings in this District in the fall of 1944 (Tr. pp. 754-5 and 690).

The above overt acts were in addition to the constant harassment of appellant by appellees during all of the period of time between the formation of the conspiracy in 1929 and the judgment of the District Court in 1944. This constant harassment is set forth and described with particularity throughout the complaint. In paragraph 81 of the complaint (Tr. p. 53) all of such activities are consolidated as "acts done and performed pursuant to said conspiracy." This allegation is not denied.

In addition, this Court implies that an overt act is not such unless it in itself causes damage. That is not a correct interpretation of the law, for an overt act need not necessarily bring about damage; it can be such without inflicting damage. For instance, the carrying of a letter from one conspirator to his co-conspirator could constitute an overt act and yet no direct or provable damage might result from the mere act of carrying such a letter. This point was directly passed upon by this Court, Justice Haney writing the decision, in

Marino v. United States, 91 F.2d, 691, pp. 694-5. udge Haney states:

> "The crime is completed when an overt act affect the object of the conspiracy is done by at least one of the conspirators. An overt act is something apart from the conspiracy, and is 'an act to effect the object of the conspiracy.' Joplin Mercantile Co. v. United States, 236 U.S. 531, 535, 35 S. Ct. 291, 293, 59 L.Ed. 705. It need be neither a criminal act, nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement, and must be done in furtherance of the object of it."

While the Marino case was a criminal action, the same ule would necessarily apply in a civil action. Interpreted n terms of a civil action, this would mean that an overt ct need not be a criminal act nor in itself inflict damage. Several cases are referred to under Note 12, p. 695 which old to the same end as the Marino case.

Practically the same point was recently decided by this Court in the case of

Nye & Nissen v. United States, 168 F.2d, 846.

That involved a conspiracy by which the defendants *lanned* to act. See subd. 1, p. 849, wherein it is stated that he conspirators' plan to impede the Government's functions was sufficient. No damage or actual activities were hown, the activities planned to be engaged in being held ufficient as overt acts. Even if the activities of appellees n preventing the Government from leasing the Little Placer to appellant, all as alleged in the complaint and dmitted by appellees, did not finally result in computable lamage to appellant, they were nevertheless overt acts in

furtherance of the conspiracy charged upon, and admitted Such activities were abandoned only after the conviction of and judgment against certain of appellees in the District Court for this District and until such termination were, as alleged and admitted, continuing activities in furtherance of the conspiracy, and all directed against appellant.

The Statute of Limitations begins to run from the last overt act, not from each successive overt act.

The Court in its opinion concluded that the statute ran against each overt act at the time of its performance and not, as is the law, from the last overt act committed in pursuance of a conspiracy. On p. 13 of the pamphlet opinion the Court stated:

> * * * "(b) a cause of action for damages for violation of the antitrust laws accrues when the damage is sustained and *the statute of limitations begins to run at that time;*"

That portion of the opinion read in connection with the further statement (p. 15) to the effect that the Court holds that this is an action at law for damages under Federal antitrust laws and the only damages for which a recovery might be had are those which accrued and were suffered within three years prior to the filing of the complaint, sets forth a conclusion that is not the law, *for the statute begins to run from the last overt act committed in furtherance of the conspiracy* and which in this case was subsequent to July 1944 when the United States Borax Co. commenced its mandamus action in Washington.

In *Fiswick v. United States,* 329 U.S. 211; 67 S. Ct. 224 (p. 216 of the Official Report) it is held:

"The statute of limitations, unless suspended, *runs from the last overt act during the existence of the conspiracy.* Brown v. Elliott, 225 U.S. 392, 401, 32 S. Ct. 812, 815, 56 L.Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy."

The *Fiswick* case cites

Brown v. Elliott, 225 U.S. 392; 32 S. Ct. 812.

On p. 815 of the Supreme Court Rep. the Court said:

"In Lonebaugh v. United States, 103 C.C.A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: 'While the gravamen of the offense is the conspiracy, the terms of sec. 5440 (U.S. Comp. Stat. 1901, p. 3676), are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U.S. 62, 76, 50 L.ed. 90, 94, 25 Sup. Ct. Rep. 760); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.* (Citing cases)' "

Measured by such rule the statute of limitations has no application, for this complaint was filed within three years subsequent to the last overt act of the conspiracy, viz. the commencement of the mandamus proceeding involving

the Little Placer subsequent to July 31, 1944 (Tr. p. 52) during which time the Moratorium Act was in effect (Ch. 589, 56 St., 781, 77th Congress.)

From the above, we respectfully submit, is shown the error of those portions of the opinion quoted at the beginning of this subdivision.

II.

EVEN IN AN ACTION AT LAW THE STATUTE OF LIMITATIONS BEGINS TO RUN ONLY AFTER DISCOVERY BY THE PLAINTIFF OF THE EXISTENCE OF A CONSPIRACY AND HIS CAUSE OF ACTION.

American Tobacco Co. v. Peoples Tobacco Co., 204 Fed. 58 (C.C.A. 5th).

This was a civil action for damages under the antitrust act and was a case similar in many respects to the one herein presented. On p. 61 the Court said:

> "The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the Peoples Tobacco Company knew, or ought to have known, of the agreement or arrangement called 'a combination or conspiracy' on the part of the other tobacco companies against it. *While it might have known that its profits were falling off, and that the competition of the Craft*

Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run. We think this states substantially the law of the case, and is the correct view of the question of prescription."

The italics portions of the above quotation show the striking similarity to the facts presented in the case at bar, for here, while appellant knew that it was being damaged, and may have at various times believed that the acts of appellees were the cause thereof, that alone did not give appellant a cause of action under the Sherman law until it discovered the conspiracy of 1929. Further, the Court stated (p. 63) as follows:

"Why should not the prescriptive period in this case commence at the time the combination against the plaintiff was discovered? The Sherman Act gives the right to an action for conspiracy to injure the business of the plaintiff, such as was alleged, and such as we must consider to have been established in this case. No action could be brought by the plaintiff until he had knowledge of the facts which gave him a cause of action. We think the court below was right in holding as it did on this question."

The Court cited and relied upon the case of

Bailey v. Glover, 21 Wall. 342; 22 L.ed. 637.

On p. 62 the Court in the *Tobacco* case quoted from *Bailey v. Glover* as follows:

"In Bailey v. Glover, 21 Wall. 342, 22 L.Ed. 636, in the opinion by Mr. Justice Miller, this is said:

'In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party.'

"Afterward in the opinion the following is added:

'But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds —to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason

why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'

"This case of Bailey v. Glover has since been frequently recognized in decisions by the Supreme Court and other United States courts. In Traer v. Clews, 115 U.S. 528, 6 Sup. Ct. 155, 29 L.Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U.S. 538, 6 Sup. Ct. 159, 29 L.Ed. 467):

'The case of Bailey v. Glover has never been overruled, doubted, or modified by this court.'

"Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here."

This rule laid down in *Bailey v. Glover* was adopted by he Supreme Court in the *Holmberg* case, supra, and also n the *Peoples Tobacco* case, supra.

III.

'HE COURT ERRED IN HOLDING THAT APPELLANT KNEW FROM MAY 17, 1929 TO OCTOBER 10, 1939 THAT IT HAD BEEN DRIVEN OUT OF BUSINESS BY ACTS OF APPELLEES WHICH VIOLATED THE ANTITRUST LAWS. (Pamphlet opinion, page 15)

Under the evidence as presented the case should have been submitted to the jury, not taken from it and decided by the Court, because there was a direct conflict in the testimony, which entitled appellant to have the point in question submitted to the jury. During Mr. Burnham's testimony he was asked and answered as follows (Tr. p. 356):

"Q. Mr. Burnham, did you know on May 17, 192[illegible] or at any time between May 17, 1929 and October 10 1939, inclusive, that the business of the Burnham Chemical Company, the plaintiff herein, had been damaged by the acts of the defendants, or some of them, in violation of the Antitrust Laws?

"A. No.

"Mr. Harrison: I object to that on the ground it calls for the conclusion of the witness, if the Court please, is leading, and is the precise issue to be passed upon by the jury.

"Mr. Carr: It is asking him about a fact, whether he knew.

"The Court: I will overrule the objection. You can cross-examine him on that.

"Q. (By Mr. Carr): What is your answer, Mr. Burnham?

"A. The answer is 'No.'

"Q. Did you do anything from May 17, 1929 to October 10, 1939, inclusive, to ascertain whether or not the defendants herein, or some of them, had violated the Antitrust Laws?

"A. Yes, I did.

"Q. What did you do?

"A. I did a great many things."

Thereafter the witness testified to his many activities, in the West, in Washington, D.C. and in various States, undertaken in an effort to discover whether or not defendants had violated the antitrust laws. He further testified as to his inquiries made of various Government agencies and his requests to them for assistance in the determination of such question, and of his inability to secure such assistance or information.

On cross-examination appellees introduced many documents which they contended showed belief (but not knowledge) on the part of Mr. Burnham in and of the existence of the conspiracy charged upon in the complaint, the cause of action. In spite of our many objections the lower court allowed such evidence although many of the facts referred to incidents that occurred prior to the formation of the conspiracy of '29 and even prior to the date May 17, 1929 fixed by the court in its pre-trial order. Even if such pre-trial order was correct, which we claim it was not, such testimony raised straight questions of fact, viz. as to the belief or knowledge of Mr. Burnham, and which facts should have been submitted to the jury for its determination. The lower court erred in taking this case from the jury—a plain question of fact was at issue, viz. whether or not Mr. Burnham had such belief or knowledge as suggested in the pre-trial order. The purpose of calling the jury was to have it pass upon just that fact, yet when the same was presented in the evidence, the court withdrew the case from the jury and decided it itself.

This, we again contend, was reversible error.

We also respectfully submit that in view of the record and the foregoing facts it was not the right nor within the province of this Court to pass upon such question of fact or to express itself as it does on p. 15 of the pamphlet opinion. Without affirmatively approving the pre-trial order of the lower court referred to on p. 6 of the pamphlet opinion, this Court in effect does approve

such pre-trial order and this in the face of the decision of this Court itself. In

Fleishhacker v. Blum, 109 F.2d 543,

Judge Healy stated:

> "We are satisfied that the proof is such as to require a finding that the Bank did not discover the fraud until appellees brought it to light by their investigations. Hence the action is not barred as to the Bank.
>
> "The word 'discovery,' as used in the statute means actual knowledge, or knowledge of facts which in the exercise of due diligence, would have led to an actual discovery of the fraud. Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 701, 703, 16 P.2d 268; Lady Washington etc. Co. v. Wood, 11 Cal. 482, 46 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243; Prentiss v. McWhirter, 9 Cir., 63 F.2d 712, 715."

The pre-trial order is directly contrary to such holding, for such order is based on "belief" rather than "discovery." In the face of the decision in the *Fleishhacker* case it is difficult to understand how this Court could have approved, even inferentially, the pre-trial order.

This Court, while relying on the State Statute of Limitations, refuses to give the interpretation placed thereon by the Courts of California in such cases as *Pashley v. Pacific Electric Co.,* 25 Cal.(2) 226.

The same rule was announced in

American Tobacco Co. v. Peoples Tobacco Co., 20 Fed. 58,

olding that the period of limitation did not begin to run ntil the plaintiff had *discovered the existence of the con-piracy*—its cause of action. This does not mean *belief* hat such cause of action existed—it holds that actual dis-overy of the same is necessary before the statute begins o run. The actual discovery by appellant of the existence f the conspiracy did not occur until the filing by the overnment of its indictment and action in the District ourt in 1944. That is alleged in the complaint and that as Mr. Burnham's testimony. The question of whether r not such testimony was correct should have gone to he jury.

We have contended all along that the pre-trial order id not state the law. We again affirm that contention, asing our belief upon Judge Healy's opinion in the *leishhacker* case as well as the other authorities cited n our various briefs, particularly our opening brief (pp. 7 et seq.).

The statement in the opinion at p. 15 of the pamphlet eport, commencing with the word "Quotations" and nding with the words "and so advised it," is a direct epudiation of the holding of the authorities cited supra, o the effect that such an action as the present is upon he *conspiracy* and not upon the damages suffered. The harges as to the conspiracy of '29 and alleged in the omplaint are totally ignored and the opinion is based pon the overt acts. The statement that appellant was *onvinced* that it had a case against appellees by reason f the violation of the anti-trust laws is directly contrary o the testimony of Mr. Burnham; he spent days and nonths trying to ascertain whether or not such violation

existed without an answer, until the Government com menced its actions in 1944, after long and difficult in vestigations. The evidence introduced by appellees show the endeavors of Mr. Burnham to discover the real fac and is confirmatory of Mr. Burnham's testimony instea of contrary to it. Therefore, the question of fact pr sented was as to whether or not Mr. Burnham *shoul have discovered* through such activities on his part, th conspiracy and intents of appellees. That was a que tion of fact which should have gone to the jury—it wa for that very purpose that the lower Court called th jury. The question is whether a plaintiff in such situa tion *discovered* or should have *discovered the cause o action,* not whether he believed in the existence of th cause of action.

As to the Question of Concealment

From the way the opinion is written it is difficult t determine whether or not the part beginning with (f) o p. 15 is the claim of appellees or the opinion of the Court Such question was fully discussed in our briefs, to whic we refer, viz., Reply Brief, p. 24 to 29 inc., also Reply Brief to American Potash, etc., pp. 8 to 11 inc. Fraudu lent concealment was clearly proved. Furthermore, the public interest is always present in these anti-trust cases, whether they be government or private actions.

IV.

THIS COURT ERRED IN REFUSING TO APPLY THE DOCTRINE OF HOLMBERG v. ARMBRECHT, 327 U.S. 392.

Both the *Holmberg* case and the one at bar are based upon Federal statutes creating rights of action, and there

ould seem to be no reason why the rule adopted in the *olmberg* case should not be equally applicable to the acts presented herein. That the *Holmberg* case was on he Equitable side of the court was not because it was an ction to recover the double liability of bank stockholders s indicated in the opinion of this Court, but because of he *concealment* by Bache of his ownership of the stock question. See p. 397 of the Report of the *Holmberg* ase. Here, the evidence shows without doubt the con-ealment by appellees of their intent to destroy appellant nd the formation of the conspiracy of '29 so to do, by eason of which situation the rule of the *Holmberg* case hould have been adopted herein, or at least the case hould have been sent to the jury for a finding as to whether or not, from the evidence presented, appellant had *discovered* the conspiracy—not believed in the exist-nce of a conspiracy.

V.

HIS COURT FAILED TO PASS UPON THE FOLLOWING QUES-TIONS PRESENTED AND URGED IN APPELLANT'S VARIOUS BRIEFS.

(a) The Court failed to pass upon the question of whether or not a conspiracy to destroy another financially s in and of itself a fraud upon the person against whom uch activities are directed.

This was urged vigorously in appellant's brief in reply o the brief of Borax Consolidated, Ltd. et al, pp. 14 et seq.

(b) The Court failed to pass upon the validity of the pre-trial order of the lower court. Throughout we have earnestly contended that such pre-trial order was an erroneous statement of the law in that it used "belief"

instead of "discovery" as the starting point of the running of the statute. This was presented in our opening brief, p. 14, and in our reply brief to the brief of Borax Consolidated, pp. 18 et seq.

(c) Likewise this Court failed to pass upon appellant's claim that the lower court erred in refusing to allow counsel for appellant to read to the jury the complaint and the answers thereto. This point was raised in our Opening Brief, p. 30, and in our reply to the brief of Borax Consolidated, p. 29. We contend that such refusal was grievous error, in the face of the failure of appellees to deny any of the allegations of the complaint, with the exception of three paragraphs thereof.

(d) This Court failed to pass upon the claim that the conspiracy alleged was a continuing conspiracy under the doctrine of *United States v. Kissel,* 218 U.S. 601. This question involved the very important question of whether or not the doctrine laid down in the Kissel case as to a continuing conspiracy in a criminal case was also applicable in a civil proceeding. This point seems to have been totally disregarded by this Court. See Opening Brief p. 32; also Reply Brief, p. 32.

All of the foregoing points are important and were urged in good faith, and we respectfully submit are entitled to a determination by this Court, especially where, as here, questions of first impression are presented.

VI.

HE COURT ERRED IN HOLDING THAT FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT NECESSARY.

(Pages 8 and 9 of pamphlet)

This Court treats this part of the case as though this rial on the statute of limitations arose on the motions to ismiss and for summary judgment. Such an inference is ot correct. The motion for summary judgment was denied rior to this particular trial on the statute (Tr. p. 183). his particular trial was solely and separately on the uestion of the statute of limitations, not the state statute lone but on every statute of limitations which could be sed. The opinion suggests that the question of the statute as restricted altogether to the California state statute, hich was incorrect, for at all times we urged that the tatutes applicable in an equity proceeding were con-rolling here. While it is true (Tr. p. 185) that the decision n the motion to dismiss and strike was reserved until the pecial issue was decided, we contend that such special ssue was never legally or properly decided and that the uestion of fact as to the statute presented should have one to and been passed upon by the jury. Or, even in the vent that the action of the Court in withdrawing the case rom the jury might be held to be proper, the judgment of he Court thereon should have been backed by findings and onclusions of law. On the particular hearing on the tatute, the motion to dismiss played no part whatsoever. hey were separate and distinct proceedings, and this ourt should so have treated them. As the lower Court lected to withdraw the case from the jury and pass upon t as a court matter, it was governed in such action by all

of the rules requiring the preparation and filing of findings of fact and conclusions of law. This Court cannot say that appellant did not suffer prejudice by the lower Court failing to do so.

By reason of all of the foregoing, it is respectfully submitted that a rehearing should be granted.

Respectfully submitted,

STERLING CARR,
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THURMAN ARNOLD,
of Counsel.